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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, AND EDWIN SHIMODA,
Petitioners,

VS.

DELBERT KAAHANUI WAKINEKONA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF PETITIONERS SUPPORTING REVERSAL

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QUESTIONS PRESENTED

The Petitioners will address the following questions:

1. Whether state-created prisoner pre-transfer hearing rules, which do not limit or proscribe the exercise of prison official discretion in any way, trigger the Due Process Clause of the United States Consitution?

2. Whether state-created regulations guaranteeing prisoners specified procedural protections before any transfer involving a potential "grievous loss", but which contain no standards proscribing official discretion in any way, create a liberty interest subject to due process protection?

3. Whether the allegation that a prisoner was denied an independent hearing body guaranteed by State regulations, where the hearing body merely makes a recommendation to the ultimate decision-maker whose discretion is not proscribed or limited in any way by the recommendation, states a claim under 42 U.S.C. § 1983?

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

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BRIEF OF PETITIONERS SUPPORTING REVERSAL

OPINIONS BELOW

The original decision and amendment of decision of the United States Court of Appeals for the Ninth Circuit is attached to the Petition for Writ of Certiorari as Appendices A and B and was published as *Wakinekona* v. *Olim*, 664 F.2d 708 (9th Cir. 1981).

The decision of the District Court for the District of Hawaii was published as *Wakinekona* v. *Olim*, 459 F.Supp. 473 (D.Hi. 1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 26, 1981. The judgment was amended on November 27, 1981. The Petitioners' Motion for Reconsideration and Suggestion for Rehearing *En Banc* was denied on November 27, 1981. The majority of the Ninth Circuit voted against rehearing. Jurisdiction to review the judgment of the Court of Appeals is conferred on this court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the Unites States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Hawaii Revised Statutes, § 355-1:

The Western Interstate Corrections Compact is found in the Appendix F, at F-1a-7a.[1]

Hawaii Revised Statutes, § 706-672(1):

> § 706-672 Place of imprisonment. (1) When a person is sentenced to imprisonment for an indeterminate

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[1] Counsel for Respondent refused to agree to a Joint Appendix.

term, the court shall commit him to the custody of the department of social services and housing for the term of his sentence and until released in accordance with law. The court shall determine the initial place of confinement and the director shall determine the proper program of redirection and any subsequent place of confinement best suited to meet the individual needs of the committed person.

42 U.S.C. § 1983, Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REGULATION INVOLVED

Rule IV of the Supplemental Rules and Regulations of the Corrections Division of the State of Hawaii, which is the subject of this case, is attached to the Petition as Appendix D.

STATEMENT OF THE CASE

Respondent, sentenced to life imprisonment without parole by a Hawaii state court, was an inmate of the Maximum Control Unit ("MCU") of the Hawaii State Prison ("HSP"). "He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system." Appendix A, at A-2.

Rule IV of the Corrections Division (Appendix D) provides for a procedural hearing prior to an inmate's mainland transfer. The hearing panel—called a program committee—provides the administrator with a recommendation whether to transfer. The administrator has the discretion, however, to decide whether and where to transfer the inmate. The administrator's discretion is plenary, absolute and unfettered by any conditions or standards. Accordingly, the Rule does not purport to condition a prison administrator's power to transfer an inmate, other than to afford the inmate a right to a procedural hearing.

On August 5, 1976, Respondent received a notice that, on August 10, 1976, he would appear before a program committee:

> [t]o determine whether your classification with the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, security of State facilities and personnel, and needs of the other inmates. The Committee will consider whether you should remain at HSP, be transferred to another Hawaii facility or be transferred to a mainland state or federal institution. Exhibit A to First Amended Complaint, Appendix G, at G-15a.

On August 10, 1976, Respondent appeared before the program committee, where he was given all the procedural rights guaranteed by Rule IV. On August 11, 1976, the committee, which was concerned about the threat Respondent presented to the security and safety of Hawaii's prison system, recommended that he be transferred to the mainland:

> The Program Committee, having reviewed your entire file, your testimony and arguments by your

> counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at MCU because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland. *Id.*

On August 11, 1976, the prison administrator affirmed the recommendation and, with the approval of the Director of the Department of Social Services and Housing and the Governor of Hawaii, transferred Respondent to Folsom State Prison in California.

Respondent filed suit in the United States District Court for the District of Hawaii, alleging, *inter alia*, that the procedures adhered to in his transfer hearing were in violation of the Due Process Clause of the United States Constitution.

The District Court dismissed the complaint on the ground that, under Rule IV (Appendix D), the prison administrator had unlimited discretion, not subject to standards governing the exercise thereof, to transfer prisoners to the mainland. It therefore concluded that since Respondent's transfer did not implicate a constitutionally protected liberty interest, due process did not attach. *See* Appendix C.

The United States Court of Appeals for the Ninth Circuit, in a split (2 to 1) decision, reversed on the ground

that the right to a state-guaranteed procedural hearing in Rule IV creates a "justifiable expectation" in having a hearing before transfer and thus triggers the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See* Appendix A. The Ninth Circuit nevertheless recognized that its conclusion was in conflict with the "First, Second, and Sixth Circuits." Appendix A, at A-7.

Petitioners filed a Motion or Reconsideration and Suggestion for Rehearing *En Banc* alleging, *inter alia*, that a recent Hawaii Supreme Court case (*Lono* v. *Ariyoshi*, Hawaii, 63 Haw. 138, 621 P.2d 976 (1981) (Appendix E to Petition)) held that Rule IV's hearing procedure did not trigger due process protections:

> Thus, H.R.S. § 706-672 and Rule IV of the Rules did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States Constitution. Appendix E, at E-11.

The Ninth Circuit denied the motion in a split, 2 to 1, decision on November 27, 1981. *See*, Appendix B.

Your Petitioners now seek reversal of the decision of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

I

A. The protections of the Due Process Clause extend only to state action that deprives a person of "liberty" or "property". In determining whether a mainland transfer implicates a "liberty" interest, it is instructive to remember that the exigencies of imprisonment for violation of law demand the suspension of rights and privileges

normally enjoyed by law-abiding citizens. A criminal conviction ordinarily extinguishes an inmate's personal liberty to the extent of "the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976).

Mainland transfers are well within the contemplation of a Hawaii inmate's criminal conviction and sentence and therefore do not create or infringe on a prisoner's liberty interest. Firstly, such transfers are made for a variety of penological reasons, the most important of which is the maintenance of institutional safety and security. A number of courts have thus upheld the constitutionality of mainland transfers of Hawaii inmates. Secondly, the laws, regulations, and historic pattern of practice in Hawaii contemplate that some prisoners will be transferred to the federal or other state prison systems. Accordingly, the conditions of Folsom Prison were well within the contemplation of Respondent's conviction and sentence.

B. A state-created liberty interest exists only when a state has bound itself to take specified actions on the basis of determinable and objective criteria. The purpose of the Due Process Clause is to reduce the risk that the bases for which official action is taken will deviate from the established criteria. However, where, as here, the State has established no criteria, where official discretion is unfettered, and where the inmate has, at best, but a mere unilateral expectation that he will not be transferred no liberty interest exists. Under Rule IV, no facts need to be found as a predicate to an interstate transfer. Respondent could have been transferred for any reason or for no reason at all.

Thus, whatever expectation Respondent had in remaining in the Hawaii prison system was too ephemeral and insubstantial to trigger the Due Process Clause.

ARGUMENT

I. THE DECISION WHETHER TO TRANSFER RESPONDENT TO THE MAINLAND DID NOT IMPLICATE A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

The classification process, as it is implemented in the Hawaii prison system and as it has been interpreted by the Hawaii Supreme Court, is a means by which prison administrators are able to monitor an inmate and determine, on an ongoing basis, his optimum placement in the Corrections Division. As Rule IV makes clear, rather than being concerned with isolated aspects of an inmate's adjustment, classification is a "dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors." Appendix D, at D-1.

As the Hawaii Supreme Court observed, the classification process is to be distinguished from the adjustment process in that its use is not intended as a punitive measure. *Lono*, Appendix E, at E-6.

Whatever expectation Respondent may have had to remain in the Hawaii state prison system was too ephemeral and insubstantial to implicate due process since a transfer to the mainland was within the contemplation of Respondent's criminal conviction and since Hawaii prison officials had absolute discretion to transfer him for any reason or for no reason at all.

A. Respondent Has No Liberty or Property Interest in Remaining in the Hawaii Prison System

The procedural protections of the Due Process Clause extend only to state action that deprives a person of "liberty" or "property." As this Court has explained, "the

range of intersts protected by procedural due process is not infinite." *Board of Regents* v. *Roth*, 408 U.S. 564, 570 (1972). Particularly with respect to actions affecting prisoners, this Court has observed that not all deprivations implicate due process:

> [T]o hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts. *Meachum* v. *Fano*, *supra*, 427 U.S. at 225; (emphasis in original).[2]

See also *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976).

In determining whether process is due, the inquiry "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); and *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

At the outset, it is instructive to remember that this case does not involve rights of the general public. The

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[2] The Ninth Circuit's decision erroneously states that Rule IV defines an interstate transfer as a "grievous loss." Appendix A, at A-7. While Rule IV guarantees its procedures for a "transfer [which] involves a grievous loss" (Appendix D, at D-1), nothing in the Rule clearly states that Respondent's interstate transfer constitutes a "grievous loss" or that, assuming such a loss, that it creates a liberty interest. We take the position that not every "grievous loss visited upon a person by the state" (*Meachum*, *supra*, 427 U.S. at 224) creates a liberty interest. The Hawaii Supreme Court declined to find such an interest in Hawaii's Rule. *Lono* v. *Ariyoshi*, *supra*, Appendix E, at E-11. This Court should not deviate from that conclusion. Otherwise, the mere transfer of a prisoner from Hawaii to a mainland institution would bring such a transfer within the ambit of the Due Process Clause and would subject the State to the plethora of litigation that such a conclusion would generate.

exigencies of imprisonment for violation of law demand the suspension of rights and privileges normally enjoyed by law-abiding citizens. *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977); and *Wolff* v. *McDonnell*, 418 U.S. 539, 561 (1974). Such "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). While this is not to say that an inmate retains no constitutionally cognizable liberty interests (*Wolff*, *supra*, 418 U.S. at 555-556), it is firmly established that a criminal conviction extinguishes a prisoner's liberty to the extent of "the normal limits or range of custody which the conviction has authorized the State to impose" *Meachum*, *supra*, 427 U.S. at 225. *See Gittlemacker* v. *Prosse*, 428 F.2d 1, 3 (3rd Cir 1970) ("the denial of his right to drink from the cup of freedom is the very hypostasis of confinement.")

Because an interstate transfer—in its purpose and in the means by which it has been implemented in Hawaii—is within the range of custody authorized by a criminal conviction, Respondent had no legitimate expectation that he would not be transferred to California, any more than he would not be transferred from a minimum security institution to a more severe and restrictive institution of greater custody. Compare *Meachum* v. *Fano*, *supra*, with *Vitek* v. *Jones*, 445 U.S. 480 (1980).

1. Transfer of a prisoner from Hawaii to a mainland institution because he is a threat to prison staff and the orderly running of the Hawaii Prison System is within the range of custody authorized by a criminal conviction and sentence.

It is inconceivable to us that a criminal sentence would not contemplate that a prison administrator has the in-

herent and plenary power to transfer an inmate who is a threat to staff and to the orderly operation of the prison.

This Court frequently has recognized that the paramount concern of a correctional system is the safeguarding of internal security. *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979); *Jones* v. *North Carolina Prisoners' Union*, *supra*, 433 U.S. at 132; *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974); and *Procunier* v. *Martinez*, 416 U.S. 396, 404 (1974).

Respondent was transferred to California for three reasons. Firstly, because he was a "security risk", in light of his long criminal record. Secondly, because he was a threat to institutional security, in light of his predilection to "threaten and intimidate" staff. Thirdly, because there was no facility in Hawaii sufficiently secure to offer Respondent the "correctional programs you require . . ." Appendix G, at G-15a-16a.

It would be imprudent to restrict the discretion of prison administrators to transfer such an inmate out of the Hawaii prison system to a larger and more secure environment in California. It also strains credulity to suggest that such an important tool in the safeguarding of institutional security would not be anticipated by a criminal conviction and sentence.

2. Confinement in California is well within the contemplation of a criminal conviction and sentence in Hawaii.

It has not been suggested, nor could it be successfully argued, that confinement in California is not within the contemplation of Respondent's conviction in Hawaii.

In *Wolff* the Court dealt with the due process requirements attendant upon punishment of inmates for misconduct in the prison. Inherent in this inquiry was the ob-

vious fact that any punishment inflicted was not part of the original criminal conviction, since it was being imposed exclusively for post-conviction misconduct.[3]

The purpose of Respondent's interstate transfer, however, was not punishment, but rather the maintenance of institutional security. Whether or not the facilities used in California are more secure than in Hawaii is irrelevant to this inquiry, although it is noteworthy that Respondent was transferred from Hawaii's Maximum Security Unit ("MCU") to California's Folsom Prison. In his brief before the Ninth Circuit, Respondent described both maximum security institutions as "holes". Perhaps this is because both offer maximum surveillance which is required by the most recalcitrant and dangerous of prisoners, such as Respondent.

There is no suggestion, however, that Folsom Prison constitutes cruel and unusual punishment or is otherwise an unconstitutional form of incarceration.

Nor can it be suggested that Respondent had more than a unilateral expectation that he would not be transferred to the mainland.

Firstly, it is common knowledge that Hawaii inmates of the most obstreperous variety are commonly transferred to the mainland.

For example, a number of cases have upheld the constitutionality of mainland transfers of Hawaii inmates

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[3] In *Vitek* v. *Jones*, where the point was perhaps less self-evident, the Court concluded that a criminal conviction did not bring within its ambit the commitment of the convict to a mental institution. Here, by contrast, the purposes for which a mainland transfer was imposed and the nature of the actual conditions to which Respondent is subjected in California demonstrate that such confinement is well within the contemplation of the original criminal conviction and sentence.

(*Anthony* v. *Wilkinson*, 637 F.2d 1130 (7th Cir. 1980), vacated sub nom *Hawaii, et al.* v. *Medeiros, et al.*, 453 U.S. 902 (1981) (three Hawaii inmate transferred to Illinois Federal Prison); *Hillen* v. *Director*, 455 F.2d 510, 511 (9th Cir. 1972) (Hawaii inmate transferred to Folsom Prison); and *Lono* v. *Airyoshi*, *supra*, (interstate transfer of Hawaii inmate)). Even the Ninth Circuit's opinion herein concluded that "an inmate's transfer from Hawaii State Prison to a state prison in California does not raise any constitutional issues." Appendix A, at A-5, n 1.

Secondly, the Western Interstate Corrections Compact, Hawaii Revised Statutes, § 706-672, and rule IV place all Hawaii inmates on at least constructive notice that they might be transferred to a mainland institution.

For example, Rule IV, provides for the right to counsel before the program committee "[f]or a potential Interstate transfer." *See* Appendix D, at D-6. The existence of the Western Interstate Corrections Compact, by definition, contemplates the interstate transfer of inmates.

The possibility of a transfer to the mainland and the conditions of the prisons of which, we submit, are well within the "normal limits or range of custody" that a crimnal conviction authorizes a state to impose.

Therefore, if Respondent has any right to remain in Hawaii, it must arise from something other than the Due Process Clause itself, namely, from the statutes, regulations, or rules governing the terms of his confinement.

B. Rule IV Does Not Bestow Respondent With A Legitimate Claim Of Entitlement To Remain In The Hawaii Prison System

1. A statute, regulation, administrative practice, contractual agreement or other mutual understanding creates a liberty interest only if it conditions the discretion of prison officials to take specified actions only on the basis of objective criteria

A liberty interest exists only when the state has bound itself to take specified actions on the basis of determinable facts or objective criteria. As Justice Brennan stated in his concurring opinion in *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 467 (1981), a claimant must show:

> that particularized standards or criteria guide the State's decisionmakers. . . . The *structure* of the State's decisionmaking process is thus as significant as the likely *result* of that process. Respondents have not shown that the Board is required to base its decision on objective and defined criteria. . . . Accordingly, I agree that respondents have no protectible liberty interest. . . . (Emphasis in original.)

See also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, at 10 (1979); *Meachum*, *supra*, 427 U.S. at 226-227.

Thus, for example, in *Wolff* the inmates had a statutory right not to have their good-time credits forfeited except for "flagrant or serious misconduct"; the parolee in *Morrissey* v. *Brewer*, *supra*, had a statutory right to remain free unless he violated the terms of his parole; and the student in *Goss* v. *Lopez*, 419 U.S. 565 (1975), had a right to attend public school unless he was guilty of misconduct. See also *Vitek* v. *Jones*, *supra*, (state prison inmate has a right not to be transferred to a mental hospital unless he "suffers from a mental disease or defect" that cannot be treated in prison).

On the other hand, where the state has not established rules that condition decisions on objective criteria, there can be no legitimate claim of entitlement. In *Meachum*, for example, in which the state had not conditioned inter-prison transfers on proof of specific events, the inmate had no legitimate entitlement not to be transferred from a medium-security prison to a maximum-security facility. Similarly, in *Dumschat*, in which the Board of Pardons possessed "unfettered discretion" (452 U.S. at 466) to grant commutations of sentences and pardons, the inmate had no legitimate expectation that his life sentence would be commuted, notwithstanding the fact that the Board of Pardons granted approximately three-fourths of the applications for commutation of life sentences that it received.

The teaching of these cases is that, where there is no requirement that prison officials predicate their discretion on objective and determinable facts or criteria, the inmate has no legitimate entitlement in the exercise of that discretion; in such circumstances, the procedural protections of due process are not implicated. See *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (White, J., concurring in part and dissenting in part).

2. Rule IV does not create a liberty interest in inmates not to be transferred to the mainland

It is not open to question that a state may create, through regulations, a liberty interest in a matter which might otherwise be left to the unfettered exercise of official discretion. However, mere pre-transfer regulations, which do nothing more than bestow upon an inmate the right to a series of procedural steps prior to his interstate transfer, and which do not otherwise purport to condition or restrain the exercise of official discretion

in determining whether to transfer or not, do not create a liberty interest.[4]

Firstly, Rule IV itself does not purport to condition a prison administrator's power to transfer an inmate, other than to afford the inmate a right to a hearing. Rule IV sets forth no objective standards and establishes no objective criteria.

The discretion whether to convene a program committee and whether to ultimately transfer an inmate is also unconditioned. The Rule squarely places limitless discretion on a prison administrator, after receipt of the program committee's recommendation, to "[a]ffirm or reverse, in whole or part, the recommendation. . . ." Appendix D, at D-5. Thus, Rule IV bestows upon a prison administrator the final authority to transfer a prisoner "for whatever reason or for no reason at all." *Meachum, supra*, 427 U.S. at 228.

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[4] The Ninth Circuit erroneously assumed that Rule IV guarantees the right to an unbiased program committee, protectible under the Due Process Clause. Appendix A, at E-9. Respondent's claim of bias is predicated on the fact that his program committee previously reviewed his situation in the Maximum Control Unit and was otherwise prejudiced against him personally. However, for purposes of constitutional due process, which we submit is not before the court, "the mere exposure [to an adjudicatory body] to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness" of the body. *Withrow* v. *Larkin*, 421 U.S. 35 (1975). The program committee is imbued with "a presumption of honesty and integrity" which must be overcome by objective and concrete evidence of actual bias." *Id.* at 47.

In this case, Respondent must overcome several threshold issues before the question of bias becomes relevant. Firstly, he must establish a liberty interest in having a program committee which is not personally biased against him, which he cannot. Secondly, he must establish bias in the prison administrator, who transferred him,

Secondly, unlike *Greenholtz, supra*, 442 U.S. at 12, in which this Court was "denied the benefit of the Nebraska courts' interpretation of the scope of interest, if any, the statute was intended to afford to inmates", we have in this case the unamimous determination by the Hawaii Supreme Court of the interest created by Rule IV. In *Lono* v. *Ariyoshi, supra* (Appendix E), the Court concluded that Rule IV:

> 1. "do[es] not limit the authority of the director of DSSH" to transfer an inmate to the mainland (*Id.*, at E-10);
> 2. "contain[s] no standards governing the determination by the director of DSSH" to transfer an inmate [*Id.*, at E-11];
> 3. leaves "the determination of those matters [*i.e.*, interstate transfers] entirely to the discretion of the director" [*Id.*]; and
> 4. "did not clothe plaintiff with the requisite liberty interest" protectible under the Due Process Clause [*Id.*].

Finally, every Circuit Court of Appeal which has ruled on this issue disagrees with the conclusion of the Ninth Circuit:

> FIRST CIRCUIT: *Lombardo* v. *Meachum*, 548 F.2d 13, 15-16 (1st Cir. 1977) (Where there are no substantive limitations on an administrator's discretion, the right to procedural safeguards does not create substantive protections.); and *Four Certain Unnamed Inmates of Mass., Etc.* v. *Hall*, 550 F.2d 1291, 1292

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which he has not alleged. Finally, he must overcome the presumption of honesty and integrity, which he cannot.

Even if state officials were in violation of their own regulations regarding composition of the program committee, such a deviation would not be of constitutional dimension. Indeed, the implications of "constitutionalizing" all state policies and regulations would be great. This was recognized even by the majority of the Ninth Circuit panel below.

(1st Cir. 1977) ("Prison regulations which grant a right to hearings prior to transfer do not trigger the Due Process Clause.").

SECOND CIRCUIT: *Confone* v. *Manson*, 594 F.2d 934, 938 (2d Cir. 1977) (No liberty interest "entitlement can derive from a statute that merely establishes procedural requirements.") *Booth* v. *Hammock*, 605 F.2d 661, 664-665 (2d Cir. 1979) ("The State *procedural* requirements that he alleges have not been observed do not create interests entitled to due process protection. . . ."); and *Pugliese* v. *Nelson*, 617 F.2d 916, 824 (2d Cir. 1980).

FOURTH CIRCUIT: *Peterson* v. *Davis*, 421 F.Supp. 1220 (E.D. Va. 1976), *aff'd*, 562 F.2d 48 (4th Cir. 1977) (Affirmed a decision which held that promulgated transfer hearing procedures do not trigger due process and thus hearings were "not constitutionally required.").

SIXTH CIRCUIT: *Bills* v. *Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) ("[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest.").

The procedure set forth in Rule IV simply does not establish any criteria upon which a liberty interest could attach.

II. FAILURE TO REVERSE THE NINTH CIRCUIT DECISION WOULD ACHIEVE MISCHIEVOUS RESULTS AND WOULD FRUSTRATE CORRECTIONAL PRACTICES

Hawaii adopted Rule IV because it determined that "prudent prison administration requires pretransfer hearings". *Meachum*, *supra*, 427 U.S. at 229. While Hawaii felt that it was necessary and important to involve inmates in the process by which it is ultimately decided whether they will be visited with an interstate transfer, Hawaii was careful not to constrain official discretion in

order to preclude the possible constitutionalization of Rule IV.

Unfortunately, the Ninth Circuit found otherwise and, despite Hawaii's obvious intent to the contrary, held that Rule IV triggered the application of the Due Process Clause. This decision should not be upheld for a number of important considerations.

First, the Ninth Circuit's opinion will do little more than discourage prison administrators from adopting pre-transfer hearing procedures and, indeed, encourage them to eliminate those already in effect. Such a result would frustrate "prudent prison administration" and would not be in the best interests of the inmates for whom Rule IV was adopted.

Second, "transfers between institutions", whether inter- or intra-state, "are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of an inmate." *Meachum, supra*, 427 U.S. at 225. Courts ought to leave considerable leeway in this area for the exercise of discretion by informed prison officials. To hold otherwise would place the federal judiciary "astride the day-to-day functioning of state prisons and involve the judiciary in issues of discretionary decisions that are not the business of federal judges." *Meachum, supra*, 427 U.S. at 228-229[5]

Third, the close relationship of interstate transfers with the need to maintain institutional safety and security should compel reticence in finding a liberty interest. These are the matters best left to the expertise of officials

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[5] In *Wolff, supra*, 418 U.S. at 561-567 and in *Procunier, supra*, 416 U.S. at 404-405, this Court recognized that the callous and recalcitrant nature of imprisoned criminals and the complex and intractable" difficulties of prison management contributed toward a "broad hands-off attitude [by the courts] toward problems of prison management. . . ."

who are charged with the duty of maintaining the security of our prisons.

Fourth, the Ninth Circuit's opinion places an intolerable burden on the judiciary to define at what point a state has established a sufficient number of procedures to trigger the Due Process Clause. The Ninth Circuit held that a liberty interest was created merely because Rule IV was so "detailed." (*See* footnote 4 at 664 F.2d 712, which was mistakenly omitted from Appendix A.) The decision assumes, without deciding, that something less than Hawaii's Rule IV would not implicate due process. However, this begs the question as to what threshold quantum of procedure is necessary to create a liberty interest. We submit that to answer that question would propel the federal judiciary into an esoteric definitional morass. Rule IV is but a string of procedural rights unconnected by any substantive limitations. Respondent has no reasonable expectation or stake in the outcome of a program commitee hearing and nothing short of a strained and torturous legal analysis is necessary to find anything of substance lurking in the depths of the Rule.

Finally, the Ninth Circuit's cursory examination of the Hawaii Supreme Court Decision in *Lono* v. *Ariyoshi*, *supra*, fails to accord the proper deference that must be given by federal courts to the interpretation of state laws by state courts. In its original opinion, the Ninth Circuit recognized that a state court might construe a regulation as creating a liberty interest (Appendix A, at A-7 n. 3), but, in its amendment, summarily dismisses the Hawaii Supreme Court's conclusion as somehow not inconsistent with its strained interpretation of Rule IV. The Ninth Circuit cannot have it both ways. The Ninth Circuit must give more than mere deference to the *Lono* decision. It must accept the conclusion that Rule IV, by definition, leaves the matter of interstate transfers "entirely to the

discretion of the director." *Lono, supra*, Apendix E, at E-11. Once it does so, it is difficult, if not impossible, to conceive how the Due Process Clause can be triggered in this case.

Discretion should be left to Hawaii prison officials to operate Rule IV "without being subjected to [the] unduly crippling constitutional impediments" of the Due Process Clause. *Wolff, supra*, 418 U.S. at 566-567.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be REVERSED.

DATED: Honolulu, Hawaii, August 16, 1982

Respectfully submitted,

MICHAEL A. LILLY
First Deputy Attorney General
State of Hawaii
Counsel of Record

JAMES H. DANNENBERG
Deputy Attorney General
Attorneys for Petitioners

APPENDIX

APPENDIX F

CHAPTER 335
WESTERN INTERSTATE CORRECTIONS COMPACT

SECTION

355-1 COMPACT
355-2 COMMITMENT OR TRANSFER OF INMATE
355-3 ENFORCEMENT
355-4 HEARING
355-5 CONTRACTS

§ 355-1 Compact. The Western Interstate Corrections Compact as contained herein is hereby enacted into law and entered into on behalf of the State of Hawaii with any and all other states legally joining therein in a form as follows:

WESTERN INTERSTATE CORRECTIONS COMPACT

Article 1. Purpose and Policy

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment, and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of cooperation for the confinement, treatment, and rehabilitation of offenders.

Article 2. Definitions

As used in this compact, unless the context clearly requires otherwise:

(a) "State" means a state of the United States, and Guam.

(b) "Sending state" means a state party to this compact in which conviction was had.

(c) "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had.

(d) "Inmate" means a male or female offender who is under sentence to or confined in a prison or other correctional institution.

(e) "Institution" means any prison, reformatory or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may lawfully be confined.

Article 3. Contracts

(a) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(1) Its duration.

(2) Payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.

(3) Participation in programs of inmate employment, if any, the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.

(4) Delivery and retaking of inmates.

(5) Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

(b) Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific percentum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that monies are

legally available therefor, pay to the receiving state, a reasonable sum as consideration for such enlargement of capacity, or provision of equipment or structures, and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract.

(c) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

Article 4. Procedures and Rights

(a) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article 3, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or is desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article 3.

(d) Each receiving state shall provide regular reports to each sending state in the inmates of that sending state in institutions pursuant to this cmpact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have the benefit of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of th receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subdivision shall be borne by the sending state.

(g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed in account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

Article 5. Acts Not Reviewable in Receiving State; Extradition

(a) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is suspected of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(b) An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other

than the sending or receiving state, the responsibility for institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

Article 6. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have had contractual provision; provided that if such program or activity is not part of the customary correctional regimen the express consent of the appropriate official of the sending state shall be required therefor.

Article 7. Entry Into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of Congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon and Washington.

Article 8. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until two years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

SOCAL SERVICES

Article 9. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article 10. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. [L 1965, c 118, § 1; Supp, § 83E-1]

§ 355-2 Commitment or transfer of inmate. Any court or other agency or officer of the State having power to commit or transfer an inmate (as defined in Article 2(d) of the Western Interstate Corrections Compact) to any institution for confinement may commit or transfer the inmate to any institution within or without the State if the State has entered into a contract or contracts for the confinement of inmates in the institution pursuant to Article 3 of the Western Interstate Corrections Compact. [L 1965, c 118, § 2; Supp, § 83E-2]

§ 355-3 Enforcement. The courts, departments, agencies, and officers of the State of Hawaii and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions including but not limited to the making and submission of such reports as are required by the compact. [L 1965, c 118, § 3; Supp, § 83E-3]

§ 355-4 Hearing. The director of social services and his authorized subordinates and agents shall hold such hearings as may be requested by any other party state pursuant to Article 4(f) of the Western Interstate Corrections Compact. [L 1965, c 118, § 4; Supp, § 83E-4]

§ 355-5 Contracts. The director of social services may enter into such contracts on behalf of the State of Hawaii as may be appropriate to implement the participation of the State in the Western Interstate Corrections Compact pursuant to Article 3 thereof. No such contract shall be of any force or effect until approved by the governor and comptroller. [L 1965, c 118, § 5; Supp, § 83E-5]

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

FILED IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
October 6, 1976

at 2 o'clock and 8 min. p.m.
WALTER A.Y.H. CHINN, CLERK
by Leslie L. Tau'a (Deputy)

FIRST AMENDED COMPLAINT

EXHIBITS "A," "B," "C" AND "D"

DEMAND FOR JURY TRIAL

CLAYTON C. IKEI
Suite 513—116 S. King Street
Honolulu, Hawaii 96813
Telephone: 533-3777
Attorney for Plaintiff

CERTIFICATE OF SERVICE ATTACHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

FIRST AMENDED COMPLAINT

I.

INTRODUCTION

1. This is an action brought by the Plaintiff above-named against certain State officials and employees, who did cause and/or conduct a hearing to be held whereby the Plaintiff was transferred from the Hawaii State Prison to a California penal institution known as Folsom State Prison. The action complained of herein is that the named defendants, under color of State law, did willfully, maliciously and recklessly cause and/or conduct the aforesaid hearing in such a manner so as to deny the Plaintiff his constitutional rights as provided in the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and did further violate certain Hawaii State laws, state regulations and Article I, Section 4 and 9 of the Hawaii State Constitution.

II.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, 28 U.S. § 1343[3]. Plaintiff's right of action is based on 42 U.S.C. § 1983.

III.

PARTIES

3. Defendant NELSON K. DOI is an elected Lieutenant Governor of the State of Hawaii, by delegation of authority of the Governor of the State of Hawaii is generally supervising the management of Hawaii State Prison, and is an announced candidate for the office of Mayor of the City and County of Honolulu, State of Hawaii.

4. Defendant ANDREW I.T. CHANG is the appointed director of the Department of Social Services and Housing, State of Hawaii, and is responsible by statute for the supervision of the Hawaii State Prison.

5. Defendant ANTONE OLIM is the administrator of the Hawaii State Prison.

6. Defendants EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA are all employees of the Hawaii State Department of Social Services and Housing and did directly commit the actions complained of herein.

7. That the action complained of herein which were committed by the defendants WILHELM, SMYTHE, LEON, and SHIMODA were committed pursuant to the authority granted to said defendants by defendants, DOI, CHANG and OLIM and which were ratified by the defendants DOI, CHANG and OLIM and hence are their responsibility under the doctrine of Respondeat Superior.

IV.

FACTUAL ALLEGATIONS

8. That at all times mentioned herein, the Plaintiff was in the custody of the Corrections Division of the Hawaii State Department of Social Services and Housing being an inmate of the Hawaii State Prison confined to the maximum control unit therein.

9. That on August 2, 1976, the Plaintiff DELBERT KAAHANUI WAKINEKONA appeared before a board designated as a Program Committee of the Hawaii State Prison which included the defendants WILHELM, SMYTHE, LEON and SHIMODA for a hearing whose stated purpose was that of determining the reason for which the programs at the maximum control unit of the Hawaii State Prison had failed.

10. That on August 5, 1976, the Plaintiff was served with the written notice that he would have a further hearing to determine his program designation at Hawaii State Prison, which included a possible transfer to an out-of-state penal facility and that on said date Plaintiff was transferred to the correctional facility known as Halawa Correctional Facility.

11. That on August 10, 1976, a hearing was held on Plaintiff's program classification at Hawaii State Prison; that on August 11, 1976, the committee which consisted of the defendants WILHELM, SMYTHE, LEON and SHIMODA and which conducted the aforesaid hearing rendered its decision and a written copy thereof was served on Plaintiff on August 12, 1976.

12. That the decision of the aforementioned committee was that the Plaintiff should be transferred to a mainland facility. (See Exhibit "A," a xeroxed copy of said decision.)

13. That on August 13, 1976, the Plaintiff was transferred to the California correctional facility known as Folsom State Prison.

V.

FIRST CLAIM FOR RELIEF

14. That the decision of the defendants WILHELM, SMYTHE, LEON and SHIMODA was a malicious and willful violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 4 of the Hawaii State Constitution in that it was rendered by a board the composition of which was biased and

prejudicial against the Plaintiff and consisted of persons who were directly responsible for the initiation of said hearing which rendered the decision and whose specific intent and purpose was that of effectuating said transfer.

VI.

SECOND CLAIM FOR RELIEF

15. That the hearings on August 2, 1976 and August 10, 1976 were governed by state regulations promulgated and issued by the Corrections Division, Hawaii State Department of Social Services and Housing (see Exhibit "B," a xerox copy of said regulations attached hereto and incorporated herein).

16. That the transfer of the Plaintiff to the California State penal facility known as Folsom State Prison and the subsequent confinement of the Plaintiff in the "hole" at said facility was inconsistent hearing of August 10, 1976 as set forth in the aforesaid state regulations in that it was clearly punitive in design, purpose and intent, as is more fully shown by Exhibit "C" and "D," which are xerox copies of correspondence to Plaintiff's undersigned counsel and an attachment thereto.

VII.

THIRD CLAIM FOR RELIEF

17. That the actions taken by the defendants were a malicious and willful violation of state law, namely Chapter 353, Hawaii Revised Statutes.

WHEREFORE, the Appellant prays that this Honorable Court grant the following relief:

1. That a judgment issue declaring the actions complained of herein violate the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, Section 4 and 9 of the Hawaii State Constitution, Chapter 353, Hawaii Revised Statutes and applicable state regulations.

2. That general damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

3. That punitive damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

4. Such further and other relief as this Court deems proper and appropriate.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division

WAKINEKONA, Delbert K. — Name
576-42-7068 — Number

NOTICE OF PROGRAMMING

August 5, 1976 — Date
Time

You are herein informed that your correctional program is scheduled to be reviewed, evaluated, or established by the program committee/diagnostic team and you are to be present at HCF, 9:00 a.m. on the 10th of August 1976.

Reason for meeting:

To determine whether your classification within the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, security of State facilities and personnel, and needs of the Other inmates. The Committee will consider whether you should remain at HSP, be transferred to another Hawaii facility or be transferred to a mainland state or Federal institution.

/s/ Edith M. Wilhelm
EDITH M. WILHELM
Administrator

Receipt of notice: Date: _____ Signature: _____
(Resident)

Received notice of hearing on 8/5/76 at 1:57 p.m. J. Smythe

Results of meeting: (Summary) The Program Committee, having reviewed your entire file, your testimony and arguments by your counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious

felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at MCU because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland.

/s/ Edith M. Wilhelm 8/11/76
EDITH M. WILHELM
Program Commiittee Chairman

Receipt of results: Date: _____ Signature _____
(Resident)

Program Committee's recommendation is sustained.

/s/ Antone Olim
ANTONE OLIM
August 11, 1976

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
STATE OF HAWAII

SUPPLEMENTARY RULES AND REGULATIONS
OF THE CORRECTIONS DIVISION

I

PROLOGUE

The following supplementary rules and regulations shall govern inmate/ward correspondence and the adjustment and classification processes within the Corrections Division of the State of Hawaii Department of Social Services and Housing. All prior Rules and Regulations governing the identical subject matters are null and void to the extent that they are inconsistent with these regulations.

II

CORRESPONDENCE

1. *INTRODUCTION:*

   Inmates/wards shall be afforded the privilege to send and receive letters to and from correspondents approved by the facility administrator.

2. *PRIVILEGED MAIL:*

   Privileged mail is that which is sealed and marked on the envelope as "confidential" and which may be inspected only for contraband in the presence of the inmate/ward. Letters to the Ombudsman may not be opened, but may be felt for contraband.

   a. Each inmate/ward may correspond via privileged mail with the following:

      1) the inmate/ward's sentencing judge;

      2) the inmate/ward's previously identified personal attorney;

      3) the Hawaii State Ombudsman;

4) the Governor of the State of Hawaii;

5) the Attorney General (State or Federal);

6) the Director, Department of Social Services and Housing;

7) the Corrections division Administrator;

8) the State of Hawaii Board of Paroles and Pardons;

9) the Facility Administrator; and

10) elected State of Hawaii officials.

b. Those inmate/wards committed under jurisdictions other than the State of Hawaii may, in addition, correspond, via privileged mail, with the following:

1) Chief executive of the foreign jurisdiction; and

2) Director of the department in foreign jurisdiction to which committed.

3. *INSPECTION:*

Incoming or outgoing mail to and from inmates/wards may be inspected and/or read pursuant to the following guidelines.

a. *Contraband.*

A facility administrator or a designated representative may inspect all incoming and outgoing mail to and from inmates/wards for the presence of contraband contained therein.

b. *Reading.*

The facility administrator or his designated representative may reject the mailing or receipt of letters pursuant to the following guidelines.

1) *Outgoing letters.* Outgoing letters from inmates/wards may be disapproved for mailing if the letter

is to a person who is not an approved correspondent or, upon reading, the letter concerns or contains any of the following:

(a) threats of physical harm against any person or threats of criminal activity;

(b) threats of blackmail or extortion;

(c) plans to send contraband in or out of the facility;

(d) plans to escape;

(e) plans for activities in violation of institutional rules;

(f) plans for criminal activity;

(g) is in code and its contents are not understood by the reader;

(h) solicits gifts of goods or money except as authorized.

(i) information which, if communicated, would create a clear and present danger of violence and/or physical harm to a human being;

(j) material which violates postal regulations; and/or

(k) conducting an inmate's/ward's business through the mails except as authorized.

2) 2) *Incoming letters.* Incoming letters to inmates/wards may be disapproved for receipt only: for the reasons set forth in 3b(1) above; if the letter contains material which would cause psychiatric or emotional disturbance to the inmate/ward; or if the letter is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

3) *Limitations.* Disapproval of a letter on the basis that it would cause psychiatric or emotional disturbance to the inmate/ward may be done only by the facility administrator in consultation with a member of the facility's mental health or counseling staff. The letter may be disapproved only upon a finding that receipt of the letter would be likely to affect a prison discipline or security or the inmate's/ward's rehabilitation, and that there is no reasonable alternative means of ameliorating the disturbance to the inmate/ward. Outgoing or incoming letters may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

4) *Notice of Disapproval of Inmate Mail.*

(a) When an inmate/ward is probibited from sending a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portions of the letter causing disapproval shall be given the inmate/ward.

(b) When an inmate/ward is prohibited from receiving a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portion or portions of the letter causing disapproval will be given the sender. The inmate will be given notice in writing that a letter has been rejected, indicating the reason(s) and the sender's name.

(b) Copies of material from an inmate's/ward's correspondence which reveals evidence of past rule violations or contains any of the information set forth above in paragraph 3b(1) above may be placed in his file. He shall be notified in writing of the placing of any such material in his file.

5) *Use of English Language.* All letters should be written in English, but every effort should be made to accommodate those inmates/wards who are unable to write in English or whose correspondence would be unable to understand a letter written in English. The criminal sophistication of the inmate/ward and the relationship of the inmate/ward and the correspondent are factors to be considered in deciding whether correspondence in a foreign language should be permitted.

c. *Censorship.*

A facility administrator or a designated respresentative may censor incoming or outgoing mail to or from inmates/wards, subject to the following two criteria. First, censorship must further a substantial governmental interest, such as maintaining the security and order of the facility, rehabilitating the inmate/ward, or ensuring safety of facility personnel, residents, and/or the general community. Second, the facility will censor no more of the letter than necessary or essential to achieve the particular governmental interest. Thus, for example, plans for criminal activities, escape, movement of contraband, and the like may be censored, but not other unobjectionable material unrelated to the particular governmental interest. Copies of the censored material shall be placed in the inmate's/ward's file. He shall be notified in writing of the placing of any such material in his file.

III

THE ADJUSTMENT PROCESS

1. *GENERAL:*

The Adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the rights of others.

a. *Minor Misconduct.* A minor rule violation is defined as that which poses no threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of lesser penalties, such as a reprimand or the mere loss of privileges. Such misconduct may be punished by a disciplinary hearing officer designated by the facility administrator who was not actively involved in the process by which the inmate/ward was brought before him. The disciplinary hearing officer shall inform the inmate/ward that he committed a minor infraction, to which the individual must be given a brief opportunity to respond, to offer an explanation or defense on his behalf, or otherwise show that he is not deserving of disciplinary action. The disciplinary hearing officer shall thereafter prepare a brief written report to be given to the individual and placed in his file, indicating the infraction, the sanction, and the date(s) the sanction is to be or was carried out.

b. *Serious Misconduct.* A serious rule violation is defined as that which poses a threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of serious penalties, such as segregation. Such misconduct will be punished through the Adjustment Committee pursuant to the procedures set forth below.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Adjustment Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee. The Adjustment Committee has the power to punish for misconduct.

3. *PROCEDURE:*

a. *Pre-hearing detention.* An inmate/ward should not be detained pending an Adjustment Committee hearing longer than three working days; provided, however, if, in the judgment of the facility administrator, conditions exist which require longer detention, he may be so detained for a reasonable time. The guidelines set forth for emergency detention should be followed.

b. *Pre-hearing investigation.* A staff member should conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate/ward committed misconduct. If he determines probable cause exists, the following procedures shall be initiated.

c. *Notice.* The inmate/ward has the right to prior notice that an Adjustment Committee hearing will be held against him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the charged inmate/ward shall be served with written notice of the time and place of the Adjustment Committee hearing and what the specific charges, including a brief statement of the facts, are against him. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant non-confidential reports of misconduct or a summary of the details thereof during the period between the notice and the hearing.

(3) The misconduct report or summary should briefly contain the following: the specific rule violated; the facts supporting the charge; any unusual

inmate/ward behavior; any staff or inmate/ward witnesses; the disposition of any physical evidence (e.g., weapons); and any immediate action taken.

d. *Hearing*. The inmate/ward has a right to appear at the Adjustment Committee hearing, except where institutional safety would be jeopardized. Exclusion of the individual from the hearing shall occur only in exceptional circumstances and shall be well documented. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the reason for the hearing and the nature of the charge(s) against the inmate/ward. The inmate/ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

(a) A plea of guilty eliminates the need to present evidence against the inmate/ward who will then be given an opportunity to explain his actions and/or offer evidence in mitigation.

(b) A plea of not guilty necessitates the presentation of evidence against the inmate/ward.

(2) Evidence, such as testimony and reports, shall be presented to the Committee in the presence of the charged inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissable inference of guilt.

(3) *Confrontation and cross-examination:*

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its adjustment to do so would:

(i) subject the witnesses to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard:* The inmate/ward shall be given an opportunity to respond to any and all evidence against him, explain his alleged misconduct, and/or offer evidence of mitigation.

(a) He should be permitted to call witnesses and present evidence in his defense so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard,

the Committee retains the the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute:* No inmate/ward shall be represented by an attorney at the Adjustment Committee hearing. He will be permitted to employ counsel-substitute. Counsel-substitute shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

e. *Findings.* The inmate/ward has a right to be apprised of the findings of the Adjustment Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond to any evidence which may be subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissable inference of guilt, although disciplinary action must be based upon more than his mere silence. Disciplinary action may only be rendered where:

(a) the inmate/ward admits the violation or pleads guilty;

(b) the charge is supported by substantial evidence; and/or

(c) there is reasonable cause to believe that the inmate's/ward's behavior has constituted a danger to person, property, security, or the orderly operation of the facility.

(2) The inmate/ward shall be given a brief summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

f. *Punishment.* The Adjustment Committee has the power to render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited provided, however, that physical force may be employed for self-defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the Adjustment Committee:

(1) temporary or permanent loss of privileges;

(2) segregation or confinement not longer than 60 days provided, however, that a longer period may be imposed with the express written approval of the Corrections Division Administration; and

(3) any other punishment deemed necessary by the Adjustment Committee.

The Committee may also refer the matter to the Prison Program Committee for further action.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the Committee's decision.

IV

THE CLASSIFICATION PROCESS

1. *GENERAL:*

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. *PROCEDURE:*

So long as a transfer involves a grevious loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man. Thus, transfer from Hawaii State Prison to Kulani Honor Camp would normally not cause a grievous loss.

a. *Pre-hearing detention.* An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.

b. *Notice.* The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.

c. *Hearing.* The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result

in a grievous loss. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.

(2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.

(3) *Confrontation and cross-examination*:

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its judgment to do so would:

(i) subject the witness(es) to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard*: The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.

(a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute*: No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. *Findings*. The inmate/ward has a right to be apprised of the findings of the Program Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the indi-

vidual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.

(2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

V

LEGAL COUNSEL

Notwithstanding the foregoing Supplementary Rules and Regulations, an inmate/ward may retain legal counsel only in the following specific situations:

1. Classification Process:
   a. For a potential Interstate transfer.
   b. For a potential transfer to an increased security classification longer than 30 days.
2. Adjustment Process:
   a. For a potential segregated punishment longer than 30 days.
   b. For any rule violation which also constitutes a criminal felony.

Effective date: These supplementary rules and regulations shall become effective ten days after filing in the Office of the Lieutenant Governor of the State of Hawaii.

Adopted:

/s/ Andrew I.T. Chang
ANDREW I.T. CHANG
Director, Department of Social Services and Housing.

APPROVED AS TO FORM:

/s/ Michael A. Lilly
MICHAEL A. LILLY
Deputy Attorney General

Date: June 10, 1976

APPROVED:

/s/ George R. Ariyoshi
GEORGE R. ARIYOSHI
Governor, State of Hawaii

Date: June 15, 1976

EXHIBIT C

Name: D. Wakinekona B-75902X
Box No.: Reprisa, California
Date: August 16, 19__

Gil & Clayton

This is just a short note to let you, both know I'm at Folsom Prison, and right at this moment I'm in th hole!!! I just got through facing a committee a few minutes ago to see if I should go to the main yard, but there decision (wrong) was that I should remain in the hole just as I was back there in Hawaii, except in here we take a bath on Wensdays and Sunday, what system this place has, so far no programs and Hawaii say's that I'll have so

All it seems to me that I was taken out of one hole or unit and put into another one!! a bigger one though.

I hope something can be done so cause I miss Haw and my family!!

In this letter is a peice of paper which I was given on the night I arrived, it seems Hawaii made me out to be a bad guy. Maybe I'm wrong. ren isn't here with me he must be at San Quenten

Delbert

P.S.
When writing to me use may name and new number as you see it on the envelope or else I won't get the mail.

P.S.S. Send me stamps

EXHIBIT D

NAME and NUMBER WAKINEKONA B-75902X CELL: SHU 23

above named inmate arrived this date from Hawaii prison system. Placed in the Security Housing unit pursuant to memo from J. Osmpoy, AWC, which reads as follows: "On Friday August 13th at approximately 8:00 pm inmate Kakinelsona will arrive at Folsom vin CDC transportation./This inmate is from the Hawaii prison system and will be on safekeeper status at Folsom. He has been convicted of murder 1st and is serving a sentence of life without possibiliyt of parole and, for two counts of armed robbery. This inmate is on lockup status in the Hawaii prison system. He has a background of aggravated battery and has a history of escape from prison. He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system. He is to be kept separated from inmate Kashanni, who should arrive tomorrow, also from the Hawaii system, as much as possible. . . ."

IG: Central File via H. Morphis, AWC/t
CO Mr. Petrocci
AWC File
Inmate/Undersigned
August 13, 1976

/s/ F. J. Gaul, Lieutenant
F. J. GAUL
3rd Watch

CLASS. and SOC. SERV.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands a trial by jury on all issues so triable herein.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he delivered upon MICHAEL A. LILLY, ESQ., Attorney for Defendants, at his last known address, the enclosed documents on October 6, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff